WP(C) 4001/2004

BEFORE

THE HON'BLE MR JUSTICE I A ANSARI

By NIT, dated 18.03.2004, Assam Fisheries Development Corporation Ltd (in short, 'the respondent Corporation'), invited sealed tenders for settlement of various fisheries, including the fishery, known as Roumari Beel, Darrang, for a period of seven years commencing from the financial year 2004-2005 and ending in the financial year 2010-2011. The writ petitioner along with some others including the respondent No.3 offered their bids for settlement of Roumari Beel Fishery. While the offer of the writ petitioner was for a sum of Rs.22,00,055/-, the bid, offered by the respondent No.3, was for Rs.17,98,500/-. By the impugned order, dated 21.05.2004, issued by the respondent No.2, namely, Managing Director of the respondent Corporation, when the said fishery was settled in favour of respondent No.3 for the period aforementioned on his offering a bid of Rs.17,98,500/-, the writ petitioner came to this Court, with the help of the present application made under Article 226 of the Constitution of India, seeking to get the said settlement set aside and quashed on the ground, inter alia, that the settlement made, in favour of the respondent No.3, was illegal, arbitrary and in violation of the fundamental rights of the petitioner.

2. The respondents have entered appearance and resisted the writ petition by filing their affidavits. The case of the respondent Corporation is, in brief, thus: The viability rate approved by the Technical Committee, constituted by the respondent Corporation, in respect of the said fishery, for the said period of settlement, was between Rs. 15 lakhs and Rs. 18 lakhs. As the writ petitioner's offer was rupees four lakhs higher than the rate quoted by the respondent No.3 and as the rate, quoted by respondent No.3, was within the viability range, the respondent Corporation found the respondent No.3 fit for granting settlement. Yet another reason for selecting respondent No.3 is that respondent No.3 is a self-help group and these groups, under the relevant policy of the Government as well as the Banks, are preferred. The settlement, granted in favour of the respondent No.3, is, thus, in accordance with law and the writ petition has no merit.

3. As far as respondent No.3 is concerned, his case, in brief, is that the Technical Committee had found that the offer, made by the respondent No.3, was viable, whereas the writ petitioner's offer was not viable. The respondent Corporation, thus, correctly chose respondent No.3 for the purpose of making settlement and the settlement, so made, contends the respondent No.3, deserves no interference.

4. I have heard Mr. M. Nath, learned counsel for the petitioner, and Mr.G. Uzir, learned counsel, for the respondent Nos. 1 and 2. I have also heard Mr. A. Sharma, learned counsel, appearing on behalf of respondent No.3.

5. While considering the present writ petition, it needs to be pointed out that according to the guidelines, which are in force, governing settlement of fisheries by the respondent Corporation, settlement shall be given to the highest bidder. This apart, the materials, placed on record, reveal that the Technical Committee fixed the viability range long after the tenders were invited and the rates, quoted by the tenderers, had become known to all concerned.

6. The practice of fixing viability range after the rates quoted become known has been disapproved in Subhas Das and others Vs. Gauhati Municipal Corporation and others, reported in 2004(1) GLT 36.

7. The decision in Subhas Das (supra) is primarily based on the decision of the Apex Court, in Dutta Associates Pvt. Ltd Vs. Indo Merchantiles Pvt. Ltd, reported in (1997) 1 SCC 53.

8. In Dutta Associates (supra), out of 17 tenders received, tenders of tenderers

placed at SI.Nos. 1 and 2 were found ineligible and were, therefore, excluded from consideration. On such rejection, the offer of the tenderer placed at SI.No. 3, namely, Dutta Associates Private Limited, which was the lowest tenderer amongst the eligible ones, was not accepted by the official-respondents; rather, the officials determined what they called 'viability range'. This viability range was said to have been determined keeping in view the prevailing prices' outside the State inasmuch as most of the rectified spirit to be supplied under the contract had to be procured from outside the State. Though the offer of the tenderer placed at SI.No. 11 was lowest within the viability range, the State-officials did not invite even this tenderer to allot the work. They called upon Dutta Associates Private Limited to revise its offer, which it did and its bid was accepted. This was challenged before this High Court. The learned single Judge dismissed the writ petition, but on appeal, the Division Bench directed issuance of fresh tenders. The Apex Court, while dealing with this case, laid down as follows:-

\Firstly, the tender notice did not specify the 'viability range' nor did it said that only the tenders coming within the viability range will be considered. More significantly. the tender \ notice did not even say that after receiving the tenders. the Commissioner/Government would first determine the 'viability range' and would then call upon the lowest eligible tenderer to make counter-offer. The exercise of determining the viability range and calling upon Dutta Associates to make a counter-offer on the alleged ground that he was the lowest tenderer among the eligible tenderers is outside the tender notice. Fairness demanded that the authority should have notified in the tender notice itself the procedure which they proposed to adopt which accenting the tender. They did nothing of that sort. Secondly. we have not been able to understand the very concept of 'viability range'... The tenderers are all hard-headed businessmen. They know their interest better. If they are prepared to supply rectified spirit at Rs.ll.14 per LPL or so. it is inexplicable why should the Government think that the): would not be able to do so and still prescribe a far higher viability range..Thirdly, the Division Bench states repeatedly in its judgment that having determined the 'viability range', the government called upon only the appellant- Dutta Associates (third respondent in the writ petition/writ appeal) to make a counter-offer to come within the 'viability range' and that his revised offer at the higher limit of 'viability range' (Rs.15. 71) was accepted. This Division Bench has stretched that no such opportunity to make a counter-offer was given to any other tendered including the first respondent. As the Division Bench has been rightly pointed out, this equally a vitiating factor.

It is thus clear that the entire procedure followed by the Commissioner and the Government of Assam in accenting the tender of Dutta Associates (appellant herein) is unfair and opposed to the norms which the Government should follow in such matters viz openness. transparency and fair dealing. The Grounds 1 and 2. which we have indicated hereinabove. are more fundamental than the third ground upon which the High Court has allowed the writ appeal. \

(Emphasis is supplied)

9. From a close reading of what have been observed above by the Apex Court, it is clear that there were altogether three grounds, which had, according to the Apex Court, rendered the acceptance of the tender by the Government not sustainable. Out of the three grounds, ground No.1 and 2 aforementioned were held to be more fundamental than the third ground. This clearly shows that since ground Nos. 1 and 2 are fundamental in nature, the grounds, laid down therein, are imperative and must be followed in every tender process and omission to follow the law, embodied in the ground Nos. I and 2, will vitiate the acceptance of tender. In other words, the law laid down, in Dutta Associates (supra), with regard to, at least, ground Nos. 1 and 2 are general in nature and must be applied in every tender process. A close reading of ground Nos. 1 and 2 aforementioned clearly shows that the tender notice, according to the Apex Court, ought to have stated that after receiving the tenders, the Commissioner/Government would, first, determine the 'viability range' and would, then, call upon the lowest eligible tenderer to

make a counter-offer and, secondly, the concept of 'viability range' was not appealing to reasons. In the present case, since the question of viability range is involved, one has no option, but to hold that if in a tender process, the tender notice does not state as to what considerations would prevail upon the authorities concerned in accepting or rejecting the tender, then, such, a tender process is not sustainable. In other words, every NIT must disclose the procedure, which 'would be followed in the matter of acceptance of tender so that the entire tender process becomes transparent, fair and open.

10. I am guided to adopt the above view from the following further observations made in Dutta Associates (supra).

\We reiterate that whatever procedure Government proposes to follow in accepting ' the tender must be clearly stated in the ten notice. The consideration of the tender received and the procedure to be followed the matter of acceptance of a tender should transparent. fair and open. While a bona fide error or error of judgment would not certainly matter, any abuse of power for extraneous reasons, it is obvious, would expose authorities concerned, whether it is the Min' for Excise or the Commissioner of Excise, appropriate penalties at the hands of the Coul1lJ ' following the law laid down by this Court in Shiv Sagar Tiwari-Vs-Union of India, (1996)5 ' SCC 558 (In re, Capt. Satish Sharma and Sheil Kaul).\

(Emphasis is added)

11. In the present case, there is no dispute before me that the NIT, in question, did not speak of the fact that there would be a viable rate or viable range determined by the authorities concerned and that if any tenderer quotes a rate, which is either lower or higher than the viable rate, such a tender would not be accepted.

12. In view of the fact that I have already held that the law laid down in Dutta Associates (supra) is bound to be followed in every tender process and the primary requirement of a tender process to remain valid is that it must notify the intending tenderers of the procedure that the authorities concerned propose to follow in accepting tender, it clearly follows that the omission to mention that the concept of viability rate would be resorted for selecting the bidder would render the allegation of tender illegal.

13. What crystallizes from the above discussion is that the omission to mention, in the NIT, that viability range would be fixed by the authorities concerned was an incurable defect and such omission has rendered the entire process of selection of the bidder, in the present case, illegal and invalid. This apart, the writ petitioner has been a lessee of the fishery, in question. It would, therefore, be unreasonable to hold, in the absence of anything showing to the contrary, that the writ petition did not know as to how viable the bid, offered by it, was. Considering the fact that the NIT, in question, did not disclose, before the offer made by the tenderers was considered that a viability range would be fixed, the selection process, adopted by the respondent Corporation, cannot but be held to be unfair, illegal and non-transparent.

14. In the case at hand, the respondent Corporation could have fixed the viability range if it so wanted before the tenders were invited. In fact, it was the duty of the respondent Corporation to inform the bidders that if their bids were found to be outside the viability range fixed by the respondent Corporation, such a bidder would stand disqualified.

15. In the present case, the act of constituting a Technical Committee for the purpose of determining the viability range after the tenders had already been opened cannot be held to be a fair and transparent process of making selection. The decision-making process, thus, suffers from serious illegality and cannot be allowed to survive.

16. In the result and for the reasons discussed above, the impugned order, dated 21.05.2004, whereby settlement has been made in favour of the respondent No.3, is hereby set aside and quashed. The respondent Corporation is hereby directed to invite, in accordance with law, as early as possible, preferably, within a period of one month from to-day, fresh tenders for settlement of the said fishery and in the settlement process, which may be so initiated, the writ petitioner as well as respondent No.3 shall be eligible to participate unless they are, otherwise, found not eligible.

17. Before parting with this writ petition, it hereby made clear that no settlement for the interim period shall be made by the respondent Corporation with any of the parties, who had participated in the said tender process.

18. With the above observations and directions, this writ petition shall stand disposed of.

19. No order as to costs.